No. 83-30

In the Supreme Court of the United States

OCTOBER TERM, 1983

MONIKA BAGBY, ET AL., PETITIONERS

v.

CYRUS VANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-30

MONIKA BAGBY, ET AL., PETITIONERS

v.

CYRUS VANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the district court erred in dismissing their complaint for lack of diligent prosecution.

1. Petitioners are former residents or representatives of former residents of Jonestown, Guyana. Their complaint (Pet. App. C), filed in the United States District Court for the Northern District of California, alleges various acts of negligence and intentional misconduct by numerous named and unnamed government officials[1] arising out of the shootings and suicides of People's Temple members and others in

[1]Petitioners named as defendants Secretary of State Cyrus Vance; United States Ambassador to Guyana John R. Burke; Richard A. Dwyer, Deputy Chief of Mission of the State Department, American Embassy Consulate; Elizabeth Powers of the Special Consular Services, Department of State; Director of Central Intelligence Stansfield Turner; United States Commissioner of Customs Robert E. Chasen; Attorney General Griffin B. Bell; and Rep. Clement Zablocki, Chairman of the House Committee on Foreign Affairs. Unnamed defendants include 55 agents of the CIA, 500 Department of State employees, 500

Jonestown in November 1978. The complaint seeks $13 million in compensatory damages and $50 million in punitive damages. Although petitioners filed their complaint on October 13, 1981, none of the defendants was ever served.

On February 2, 1982, the district court ordered petitioners' counsel to appear at a hearing scheduled for February 25, 1982, in order to show cause why petitioners' action should not be dismissed for lack of prosecution, pursuant to N.D. Cal. R. 235-11. Pet. App. D. Local Rule 235-11, in conformity with Rules 41(b) and 83 of the Federal Rules of Civil Procedure, authorizes district judges in the Northern District of California to notice a case for hearing on a dismissal calendar for lack of diligent prosecution. Pet. 4. The local rule specifically provides that a plaintiff's failure, *inter alia*, to serve a defendant with the initial pleading within 40 days of filing "shall be presumptive evidence of lack of prosecution." *Ibid.* In accordance with Local Rule 235-11, petitioners' counsel also was ordered to file a certificate setting forth "the nature of the cause, its present status, the reason it has not been brought to trial or otherwise terminated, and its expected course if not dismissed." Pet. App. D2.

In his certification, petitioners' counsel contended first that his failure to serve the complaint within the 40-day limit resulted from the complexity of the case. He stated (Pet. App. E5-E6) that the factual issues surrounding the events in Jonestown were "far from clear at present time" and that additional discovery would "necessitate further amendment of the complaint, regarding theories and parties." Counsel for petitioners also represented (*id.* at E6) that he had "no experience with federal civil court rules" and that he was planning to take a "CEB course in late

---

Department of Justice employees, 500 Customs Service employees, and 500 "agents or servants" of the House of Representatives. Pet. App. C4-C6.

March [1982] that will educate me." Specifically, he claimed (*ibid.*) that he was unfamiliar with Local Rule 235-11 and that he had relied upon an outdated copy of the local rules in preparing his case. Finally, counsel asserted (Pet. App. E6-E7) that "[b]ecause of the complexity of this case and because of the parties involved, if I had known [of] the rule and began service of process on the first day after filing of the complaint, it is very doubtful that I could have [complied] with this rule."

Following a hearing on February 25, 1982 (Pet. App. F), and "after considering less stringent alternatives" (Pet. App. B2), the district court dismissed petitioners' action without prejudice. *Ibid.* The court of appeals affirmed. Pet. App. A.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

a. Petitioners contend that N.D. Cal. R. 235-11, which authorizes district courts to dismiss actions "which appear not to have been diligently prosecuted," is contrary to the Federal Rules of Civil Procedure. This claim is baseless.

Fed. R. Civ. P. 41(b) specifically authorizes the entry of involuntary dismissals "[f]or failure of the plaintiff to prosecute." This Court also has recognized "the power of courts, acting on their own initiative, to clear their calenders of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief." *Link* v. *Wabash R.R.*, 370 U.S. 626, 630 (1962).

Moreover, contrary to petitioners' suggestion (Pet. 23), Local Rule 235-11 did not mandate dismissal here "merely because plaintiff failed to serve his complaint within 40 days." By its terms, the rule simply creates a *rebuttable* presumption that a plaintiff who does not serve a complaint

within 40 days of filing is not prosecuting diligently. Indeed, the rule expressly provides a plaintiff with the opportunity to file a written certification and make a personal appearance to show " 'whether good cause exists to dismiss [the action or proceeding] for failure to prosecute.' " Pet. 4, quoting N.D. Cal. R. 235-11.

Here, petitioners' complaint had been filed for nearly four months before the district court ordered them to show cause why it should not be dismissed for failure to prosecute. Even after learning of Local Rule 235-11 and the requirement for prompt service upon penalty of dismissal, petitioners made no attempt to serve *any* of the numerous named defendants and gave no indication of an intent to make service immediately.[2] Instead, petitioners' counsel attempted to excuse his failure to comply by reliance on the complexity of the case and his own unfamiliarity with the local rules of practice (see pages 2-3, *supra*). But the complexity of a case and the consequent need for discovery cannot excuse the failure to serve process upon a named defendant. To the contrary, the need for prompt service is particularly acute in complex cases so that the defendants, as well as the plaintiffs, are afforded adequate time for preparation of their case. See *Anderson* v. *Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976). Nor does petitioners' counsel's alleged unfamiliarity with local law excuse his noncompliance; attorneys practicing before a district court are charged with knowledge of its rules. In these circumstances, the district court acted well within its discretion in dismissing petitioners' complaint for failure to prosecute.

b. Petitioners rely heavily (Pet. 15) on the underlying purpose of the Federal Rules of Civil Procedure "to afford plaintiffs a chance to litigate their cases on the merits."

---

[2]Rather, petitioners' counsel's apparent intention was to continue discovery until April 1982 and "to amend our complaint within 60 days thereafter." Pet. App. E7.

Although the district court specifically dismissed their complaint without prejudice, petitioners claim (Pet. 16; footnote omitted) that the dismissal "will have the same effect as dismissal with prejudice due to the bar of the applicable statute of limitations."

At no point in either his written certification (Pet. App. E) or his oral presentation (Pet. App. F) did petitioners' counsel advise the district court that a dismissal without prejudice would preclude him from refiling the action. In any event, the policy of the Federal Rules of Civil Procedure to encourage litigation of cases on their merits does not override a defendant's interest in freedom from defending stale claims. Cf. *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

> To permit a delay in service when the complaint is served immediately prior to the running of the statute of limitations undercuts the purposes served by the statute. Once the statute has run, a potential defendant who has not been served is entitled to expect that he will no longer have to defend against the claim. If service can be delayed indefinitely once the complaint is filed within the statutory period, then expectations are defeated and the statute of limitations no longer protects defendants from stale claims.

Anderson v. *Air West, supra*, 542 F.2d at 525. Here, the injuries that are the subject of petitioners' complaint occurred on November 18, 1978. According to petitioners' counsel (Pet. 16 n.17), the longest applicable statute of limitations "appears to be three years," and petitioners' complaint was filed on October 13, 1981. Pet. App. C1. In these circumstances, the district court did not abuse its discretion in dismissing petitioners' complaint when service of process had not even been attempted by February 25, 1982.

c. Petitioners argue that the standard of review employed by the court of appeals in affirming the district court's order of dismissal conflicts with the standard employed by other courts of appeals. This claim also lacks merit.

In affirming the district court's dismissal of petitioners' complaint, the court of appeals expressly relied (Pet. App. A2) on the abuse of discretion standard mandated by this Court in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962). Accord, *e.g.*, *Cherry* v. *Brown-Frazier-Whitney*, 548 F.2d 965, 969-970 (D.C. Cir. 1976); *Ramsey* v. *Bailey*, 531 F.2d 706, 708 (5th Cir. 1976), cert. denied, 429 U.S. 1107 (1977); *Michelsen* v. *Moore-McCormack Lines, Inc.*, 429 F.2d 394, 395 (2d Cir. 1970). Applying that standard, the court of appeals observed (Pet. App. A3) that the district court had weighed all of the relevant factors, including the extent of the delay, the reasons for the delay, the presumption of prejudice arising from the delay, whether petitioners had been warned that delay might result in dismissal, and whether less drastic alternatives would serve the court's purposes. Indeed, the court of appeals independently evaluated the grounds proffered by petitioners in the court of appeals[3] in justification of their failure to serve the complaint and remarked (Pet. App. A3): "The first two reasons are frivolous; the third substantially untrue; the fourth is wrong; and the fifth is contradicted by the record." As a result, the court of appeals concluded (*ibid.*) that it was unable to "say that the balance * * * struck [by the

[3]In the court of appeals, petitioners argued (Pet. App. A3): (1) the case was complex; (2) extensive discovery was necessary; (3) counsel was unaware of Local Rule 235-11; (4) Local Rule 235-11 operated harshly in a complex case; and (5) the district court failed to consider less drastic alternatives to dismissal.

district court] in favor of dismissal was arbitrary and capricious."[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

---

[4]None of the cases on which petitioners rely (Pet. 12) involved conduct similar to petitioners' failure to effectuate service on any of the named defendants within more than four months of the filing of the complaint, even after notification by the district court that such failure could result in dismissal. In *Holt* v. *Pitts*, 619 F.2d 558 (6th Cir. 1980), the district court had dismissed an action by an incarcerated plaintiff for failure to prosecute on the basis of the plaintiff's failure to appear at two preliminary hearings. The court of appeals held that the district court had "clearly abused its discretion" in so ruling, where the reason for the plaintiff-inmate's failure to appear was the district court's refusal to issue a writ for his production. In *Dove* v. *CODESCO*, 569 F.2d 807 (4th Cir. 1978), the court held that dismissal was not warranted by counsel's absence from a pretrial conference that was the result of local counsel's failure to notify non-resident counsel that a conference was scheduled. Similarly, in *Graves* v. *Kaiser Aluminum & Chemical Co.*, 528 F.2d 1360 (5th Cir. 1976), the court held that the district court had erred in dismissing an action with prejudice on the basis of plaintiff's counsel's failure to submit a proposed pretrial order and failure to reschedule a pretrial conference where, the court assumed (*id.* at 1362), the failure to appear resulted from a mix-up in dates. Finally, in *Moore* v. *St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976), the court held that the district court had abused its discretion in entering a dismissal with prejudice on the basis of the plaintiff's and his counsel's failure to appear on a rescheduled trial date, where counsel's absence was due to conflicting court obligations.